Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Consumer Banking Association's Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code	**CG Docket No. 02-278** **DA 05-1347; 04-3185**

SUPPLEMENTAL COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter" or the "Company"), by its attorneys, hereby submits these Supplemental Comments in the above-referenced proceeding. Charter is a broadband communications company with over 6 million customers in 37 states. Through its broadband networks, Charter offers traditional cable video programming (both analog and digital), high-speed cable Internet access, advanced broadband cable services (such as video on demand ("VOD"), high definition television service, and interactive television) and, in some markets, telephony service, primarily through voice over Internet Protocol ("VoIP") technology.

BACKGROUND

As a provider of advanced broadband services, it is critical that Charter be able to market its broadband products and services to its existing cable customers throughout its multi-state service territory, including Wisconsin. Charter frequently conducts its telemarketing activities as part of specific, targeted regional or national campaigns. Many of these campaigns necessarily involve interstate calls. However, Charter's efforts to conduct such campaigns are complicated because in addition to the Commission's rules, a myriad of state requirements apply. This is particularly evident in Wisconsin where additional state requirements impose significant compliance burdens on the Company that render strategic regional or national marketing campaigns infeasible. Charter believes that in Wisconsin as elsewhere, telemarketing to existing customers can be accomplished while fully valuing and protecting its customer's privacy rights through compliance with the Commission's rules for interstate calls.

On June 29, 2005, the Commission published in the Federal Register a request for supplemental comments in the above-referenced proceeding to assemble a more complete administrative record.[1] The Commission stated that it wanted to expand its record to specifically consider recent developments including the filing of the Joint Petition for Declaratory Ruling that the FCC has Exclusive Jurisdiction Over Interstate Telemarketing ("Joint Petition")[2] on April 29, 2005 by thirty-three organizations engaged in interstate telemarketing and a North Dakota state court's ruling that a state ban on prerecorded messages was not preempted by federal law even for political polling calls. Charter is responding to the Commission's invitation for comments.

[1] 70 F.R. 37318 – 37320. *See also* FCC Public Notice DA 05-1347, rel. May 13, 2005.

[2] *See Alliance Contact Services, et al. Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing*, filed April 29, 2005.

ARGUMENT

I. THE COMMISSION SHOULD PREEMPT WISCONSIN'S MORE RESTRICTIVE TELEMARKETING LAWS AS APPLIED TO INTERSTATE CALLS

Charter submits these supplemental comments to affirm the positions specified in its Comments submitted February 2, 2005 ("Charter Initial Comments") and its Reply Comments ("Charter Reply Comments") submitted February 17, 2005. In the Charter Initial Comments and Charter Reply Comments, the Company demonstrated the need for Commission preemption of certain sections of the Wisconsin Statutes and Wisconsin Administrative Code as applied to interstate calls. First, Wisconsin's laws impose significant additional constraints on interstate telemarketing. When consumers are enrolled on Wisconsin's No-Call list, Wisconsin (1) imposes severe restrictions on calls made to a company's existing customers to offer additional or different products from the same seller company and (2) prohibits calls from an affiliate entity with whom the residential customer has an existing relationship. Both of these restrictions severely curtail Charter's ability to market new broadband services to its existing customers. Second, Wisconsin is without authority to impose such restrictive regulations on interstate telemarketing.

Wisconsin's restrictions on calls to existing customers directly conflict with the Commission's rules promulgated under the Telephone Consumer Protection Act of 1991 ("TCPA").[3] The Commission's rules were the result of a thoughtful and careful balancing of competing interests, consistent with Congress' intent.[4] The Commission concluded that its

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[3] *See* Charter Initial Comments at 2-7; Charter Reply Comments at 18-19.

[4] In the TCPA, Congress expressed its concern with regulating in a manner that "protects the privacy of individuals [while] permit[ting] legitimate telemarketing practices." 47 U.S.C. § 227 note (Congressional Finding No. 9).

existing business relationship ("EBR") exemption is necessary to allow companies to communicate with their existing customers.[5] In promulgating national Do Not Call rules, the Commission was concerned that without a well-crafted EBR exemption, companies would not have the ability to make new offers to existing customers of "new products, services and pricing plans."[6] Thus, unlike Wisconsin's narrow existing customer exception, the Commission EBR exemption is applicable to the full range of products and services offered by a company. Also, in contrast to Wisconsin's outright prohibition on a company's use of an affiliate's EBR exemption, the Commission assesses whether a company can rely on its affiliate EBR exemption by using a flexible reasonable expectation standard. This standard examines factors such as whether the affiliate's goods or services are similar and whether the affiliate's name is identical or similar to the seller's name. The Commission should resolve these conflicting standards by preemption of the Wisconsin restrictions, which frustrate and interfere with the Commission's regulatory scheme.[7]

An even more compelling basis for preemption is Wisconsin's lack of jurisdiction over interstate telemarketing.[8] As Charter's initial WI Comments explain, Congress first established this principle in Section 2 of the Communications Act of 1934, which provided the Commission with jurisdiction over "all interstate ... communications by wire or radio" while leaving to the

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[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14078 ¶ 112 (2003) (*TCPA Order*).

[6] *Id.* ("We are persuaded that eliminating this EBR exemption would possibly interfere with these types of business relationships.").

[7] *See* Charter Initial Comments at 12-13; Charter Reply Comments at 7-8, 12-14.

[8] *See* Charter Initial Comments at 11-12; Charter Reply Comments at 2-7, 9-10.

states "jurisdiction with respect to intrastate communications ...."[9] The Commission and the Courts have repeatedly acknowledged this division in authority.[10] Congress' intent in enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), which added Section 227 to the Communications Act, was to establish a federal regulatory regime over interstate telemarketing because of the states' lack of jurisdiction over such activities.[11] Congress also expressly expanded the Commission's authority to provide concurrent jurisdiction over intrastate calls by amending Section 2(b) of the Communications Act. The amendment to Section 2(b) explicitly added Section 227 as an exception to the Commission's lack of jurisdiction over intrastate calls.

Consistent with Section 2(b) of the Communications Act, Congress included a savings clause in the TCPA to expressly allow more restrictive state regulation of intrastate calls.[12] At the same time, Congress did not alter the preexisting regime regarding interstate calls. Congress recognized that any state law regulation of interstate telemarketing was preempted by Section 2(a), and so did not include a broader savings clause in the TCPA to allow states to impose more restrictive regulations over interstate calls. In enacting the TCPA, Congress therefore affirmed the pre-existing regime of federal preemption of more restrictive state laws governing interstate

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[9] 47 U.S.C. § 152(a) and (b). *See also* Charter Initial Comments at 11; Charter Reply Comments at 4.

[10] TCPA Order at ¶ 83 (citing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) and *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930)).

[11] 47 U.S.C. § 227 note (Congressional Finding no. 10) ("Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."). *See also TCPA Order*,¶ 82 ("Congress [enacted the TCPA] based upon the concern that states lack jurisdiction over interstate calls") (citing S. Rep. No. 102-178 at 5)("Federal action is necessary because States do not have jurisdiction to protect their citizens against those who ... place interstate calls."); Cong. Rec. S16205 (Nov. 7, 1991) (remarks of Sen. Hollings) ("State law does not, and cannot, regulate interstate calls.); Charter Reply Comments at 4-5.

[12] 47 U.S.C. § 227(e)(1).

calls.[13] For interstate calls, Congress was clearly comfortable that its new national statutory scheme would adequately protect customers and properly balance the interests of consumers and telemarketers. The Commission should therefore preempt Wisconsin's laws.

II. RECENT DEVELOPMENTS CONFIRM PREEMPTION IS APPROPRIATE

The Joint Petition and the North Dakota state court ruling highlight the problems that arise for entities who want to engage in interstate telemarketing. The Joint Petition reveals that Wisconsin's laws are just one of many states' laws with requirements that vary widely from the Commission's rules. The Joint Petition carefully details these varying state requirements, revealing that in actual practice the Commission's rules are being superseded by a multi-state regime, making compliance for interstate telemarketers extremely complicated and difficult.[14] Moreover, this pattern will only worsen as state legislatures continue to propose harsher and more restrictive telemarketing legislation.[15] The North Dakota state court decision and other state enforcement actions related to interstate telemarketing only amplify the dangers to companies striving to meet the significant requirements of the Commission's rules while also contending with a multitude of varied regulatory regimes.[16]

The Joint Petition also sheds further light on why, under the Communications Act and the TCPA, the states lack jurisdiction to regulate interstate telemarketing calls.[17] Further, like Charter's Initial Comments and Reply Comments, the Joint Petition sets forth why, even apart

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[13] *See* Charter Reply Comments at 5-7.

[14] *See* Joint Petition at 9-22.

[15] *See* Joint Petition at 29-32.

[16] *See* Joint Petition at 26-27.

[17] *See* Joint Petition at 33-39.

from the jurisdictional issue, the Commission should and can act to preempt the patchwork of state laws that conflict with the Commission's uniform national, regulatory scheme.[18] Finally, as in Charter's Reply Comments, the Joint Petition explains that the states still retain consumer protection authority over intrastate calls.[19] In sum, the Commission's carefully crafted regulatory regime is consistent with the TCPA's directive to balance consumers' privacy interests with "legitimate telemarketing activities" through federal law.[20] The states lack jurisdiction to impose more stringent laws governing interstate telemarketing activities and such laws frustrate the purpose of the TCPA and the Commission's rules.

CONCLUSION

For the reasons set forth in Charter's Initial Comments and Reply Comments as emphasized and expanded upon in the Joint Petition, Charter respectfully submits that the Commission should preempt those Wisconsin telemarketing laws regulating interstate communications that are more restrictive than the Commission's rules.

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[18] *See* Joint Petition at 42-44.

[19] *See* Joint Petition at 40-42; Charter Reply Comments at 19.

[20] 47 U.S.C. § 227 note (Congressional Findings Nos. (7) and (9)).

Respectfully submitted,

CHARTER COMMUNICATIONS, INC.

By: __/s/________________________
Wesley R. Heppler
Timothy P. Tobin
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
(202) 659-9750

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Attorneys for Charter Communications, Inc.